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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LOCAL UNION NO. 5741,
UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 27, 1989

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I.

QUESTION PRESENTED

Whether a successor union (Local 5741), which the Sixth Circuit concluded did not become Local 9639's successor voluntarily, can be liable for the unfair labor practices of its predecessor solely because it accepted members from the precedessor union.

II.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Local Union No. 5741, United Mine Workers of America, and the National Labor Relations Board. Before the Court of Appeals for the Sixth Circuit Local 5741 was designated petitioner/cross-respondent and the NLRB was designated respondent/cross-petitioner.

Petitioner, Local 5741, has no parent companies, subsidiaries, or affiliates. Local 5741 is an unincorporated labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5). It is chartered by, and derives its existence from, the International Union, United Mine Workers of America.

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Local 5741, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled action on March 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 865 F.2d 733 and appears in the appendix hereto, p. 1a, *infra*.

JURISDICTION

Jurisdiction of the United States Court of Appeals for the Sixth Circuit was invoked by Local 5741 pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). The NLRB invoked the Sixth Circuit's jurisdiction pursuant to the same provisions of the Act, filing a cross-petition to enforce its order.

On January 10, 1989, the Sixth Circuit entered an order enforcing the decision of the Board and denying Local 5741's petition for review. Local 5741 filed a petition for rehearing or rehearing *en banc*, which was denied by the Sixth Circuit in an order entered March 29, 1989.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides, in pertinent part, that:

> The testimony taken by such member, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the Complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this subchapter. . . .

STATEMENT OF THE CASE

On April 9, 1980, the NLRB issued an unfair labor practice complaint alleging that District 30, United Mine Workers of America, and Local Union No. 9639, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, by striking the mining operations of Beth-Elkhorn Corporation in an effort to cause the discharge of charging party Tommy E. Cook because he was not a member of the union.[1] On February 27, 1981, the NLRB issued its order adopting a decision of an administrative law judge finding that Local No. 9639 had violated Sections 8(b)(1)(A) and (2) of the Act by causing the constructive discharge of Tommy E. Cook on August 30, 1979.[2]

By order entered on August 19, 1982, the United States Court of Appeals for the Sixth Circuit directed Local 9639 to make Tommy Cook whole by paying back pay in the amount of $12,327.65.[3] On December 4, 1985, the Director for Region 9 of the NLRB issued an order directing a supplemental hearing on the issue of back pay.[4] The supplemental hearing was required because

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[1] Rec. 1. "Rec. ___" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

[2] Rec. 1, 13.

[3] Rec. 18.

[4] Rec. 19.

Local 9639 had ceased to operate as a local union, and a substantial majority of its members had transferred to Local 5741. The issue in the supplemental hearing was whether Local 5741 was a successor, liable for its predecessor's wrongs.

In a supplemental decision rendered on April 22, 1986, an administrative law judge found that Local 5741 was a successor to Local 9639 and, as such, was liable to Tommy Cook for all back pay and accrued interest.[5] The NLRB adopted the findings and conclusions of the hearing officer in an order dated June 18, 1987.[6] On petition for review by Local 5741 and cross-petition for enforcement by the NLRB, the Sixth Circuit enforced the Board's order and denied Local 5741's petition for review.

While the majority of the panel acknowledged that "it is probably true, as Local 5741 contends, that it did not become Local 9639's successor voluntarily,"[7] it nonetheless concluded that Local 5741's involuntary acceptance of its predecessor's members did not affect its successorship liability.[8]

Judge Duggan dissenting, noted that not only did the majority acknowledge that Local 5741 did not become a successor voluntarily, but the NLRB admitted that Local 5741 "was obligated to accept valid transferees as mem-

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[5] Rec. 23.

[6] Rec. 36.

[7] 865 F.2d at 737.

[8] *Id.* at 738.

bers."[9] In view of the foregoing, Judge Duggan concluded, as Local 5741 submits here, that the majority's decision misreads and misapplies this Court's successorship decisions, including the decision in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

REASONS FOR GRANTING THE WRIT

I.

The Majority Opinion Of The Panel Of The Sixth Circuit Is In Error Because This Court's Decision In *Golden State Bottling Co.* Requires A Finding Of Willful And Knowing Assumption Of A Predecessor's Obligation Prior To Imposition Of Liability On A Successor.

As a general proposition, common law doctrines of agency, piercing the corporate veil and enterprise liability are all remedial being aimed at providing relief for those who have been injured by persons or entities that are insolvent or otherwise insulated from suit.[10] These doctrines, while largely equitable, all have defined elements that require the courts to balance the public interest, the private interest in recovery, and the fairness of imposing responsibility vicariously in each case. In exercising its remedial powers under section 10(c) of the Act, the National Labor Relations Board has borrowed these common law concepts, incorporating them, for example, in

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[9] *Id.* at 739.

[10] *See generally* P. Blumberg, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW Ch. 1 (Little Brown 1987) (discussing limited liability and policies for disregarding).

the single employer, joint employer and alter ego doctrines.

The successorship doctrine, not unlike the common law doctrines discussed above, requires the Board to sift through entire congeries of facts; to weigh a multitude of factors, no one of which is controlling; and to do so against a backdrop of everchanging circumstances in which the interests of the successor, the public and the employee are accorded differing weights. While the Board's standards are necessarily imprecise, its decisions oftimes being based on unarticulated assumptions and unexpressed conclusions about the weight of the competing interests at stake, the courts are not wholly at sea in reviewing successorship findings. This Court's decisions identifying the purpose and limits of successorship determinations offer the lower courts some purchase on firm ground. The decision in *Golden State Bottling Company,*[11] although addressed to a successor employer's liability, is such a case.

In *Golden State Bottling Company,* this Court upheld a determination by the Board that a *bona fide* purchaser of assets could be ordered to remedy an unfair labor practice of the seller because the purchaser had knowledge of the seller's wrong at the time of the sale. While the Court acknowledged the limited scope of its review of the Board's factual findings,[12] it carefully examined whether the imposition of successorship liability exceeded the Board's remedial authority under section 10(c) of the Act.

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[11] 414 U.S. 168.

[12] 414 U.S. at 172-73.

The Court held that the Board's decision, based on standards announced in *Perma Vinyl Corp.*[13] for imposing liability on a successor employer for its predecessor's unfair labor practices, did not exceed the powers conferred by section 10(c) of the Act. Specifically, the Court deemed the Board's decision to be proper because it required, as a condition precedent to imposition of liability, that the purchaser have knowledge of the seller's wrongs at the time of the sale.[14]

In upholding the Board's imposition of liability on Golden State's successor, the Court emphasized that the decision in *NLRB v. Burns Security Services*[15] remained "unqualified."[16] *Burns* held that a successor cannot, consistent with the Board's authority under section 10(c) of the Act, be bound to its predecessor's obligations unless the Board finds that the successor agreed to be bound.[17]

The *Golden State* Court went on to explain that the successor's knowledge of the prior unfair labor practice was indispensable to the imposition of liability because such knowledge enabled the successor to protect itself.

> Since the successor must have knowledge before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which

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[13] 164 N.L.R.B. 968, 969 (1967), *enf'd sub. nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 554 (5th Cir. 1968).

[14] 414 U.S. at 181 & n. 6.

[15] 406 U.S. 272, 283-84, 287 (1972).

[16] 414 U.S. at 181 & n. 6.

[17] 414 U.S. at 183-84.

> can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract.[18]

Put differently, the seller's knowledge of the unlawful act at the time of the sale provides evidence that the assets were purchased willfully, with knowledge of potential liability, at a time when the purchaser has the means to insulate itself should it choose to do so.

Obviously, the Court in *Burns* required a higher standard of willfulness for imposing a collective bargaining agreement than it did in *Golden State* for imposing liability for prior unfair labor practices. Yet, both cases require some level of knowing *and willful* assumption of another's obligations as a condition precedent to the imposition of liability. Local 5741 submits that there is no successorship decision of this Court that does not require some level of knowledge (which is tried to willfulness) as a condition precedent to imposing liability.[19]

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[18] *Id.* at 185.

[19] *See Howard Johnson v. Detroit Local Joint Board, Hotel & Restaurant Employees,* 417 U.S. 249, 254-55. *Compare NLRB v. South Harlan Coal Co.,* 844 F.2d 380, 382, 384-85 (6th Cir. 1988) (successorship upheld: purchased with knowledge); *Marlene Industries Corp. v. NLRB,* 712 F.2d 1011, 1020-21 (6th Cir. 1983), *denying enforcement in pertinent part,* 255 N.L.R.B. 1446 (no knowledge of wrong); *NLRB v. East Side Shopper, Inc.,* 498 F.2d 1334, 1336 (6th Cir. 1974) (successorship upheld: purchased with knowledge; *cf. NLRB v. Edward Cooper Painting,* 123 L.R.R.M. 2905, 2911 n. 8 (6th Cir. 1986) (alter ego finding upheld: knowledge and willfulness implicit elements of standard).

As the above cases demonstrate, and as the dissent correctly pointed out,[20] the opinion of the Sixth Circuit is in error because it fails to recognize that the knowledge requirement articulated in *Golden State* is not just one of many factors the Board considers in determining successorship. Rather, it is an indispensable element, which is aimed at assuring that the purchaser willfully acquired the assets with knowledge of the potential liability at a time when steps could have been taken to limit that liability.

In the present case, the NLRB admitted that Local 5741 "was obligated to accept valid transferees as members,"[21] a proposition that the majority accepted as true.[22] Given the foregoing, the majority's conclusion – that "[a]lthough Local 5741 may not have chosen to become the local's successor"[23] it is bound as a successor – clearly misconstrues the aim of the knowledge requirement and is inconsistent with every decision of this Court that has addressed the issue.[24]

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[20] 865 F.2d at 738-39.

[21] *Id.*

[22] *Id.* at 8-9.

[23] *Id.* at 10.

[24] For the above reasons, the Sixth Circuit's attempted distinction between this case and the decision in *NLRB v. Local 46, Metallic Lathers*, 727 F.2d 234, 237 (2d Cir. 1984), *denying enforcement in pertinent part*, 259 N.L.R.B. 70 (1981) is in error. Specifically, the distinction that *Metallic Lathers* found that the successor had no knowledge whereas it was "undisputed that Local 5741 knew of the unfair labor practice" fails to take into account that the knowledge requirement is aimed at assuring that there has been a *willful* assumption of another's obligations. 865 F.2d at 736.

B. The Imposition Of Liability On Local 5741 Is Beyond The Board's Remedial Power Under Section 10(c).

In exercising its remedial power under section 10(c), the Board cannot violate other policies of the Act.[25] This limitation extends to successorship findings.[26] Since neither this Court nor the Circuit courts have addressed union successorship liability, there are no settled standards that can be used here.

Local 5741 submits that common sense compels the conclusion that a union cannot be held responsible because it accepted union members when, had it acted otherwise, it would have arguably violated federal labor law.[27] While this fact alone should dispose of this case, other issues are raised.

Prior to deciding whether to accept members from Local 9639, how does Local 5741 weigh its duty to its present members against potential liability for refusing the membership applications? Could the NLRB compel Local 5741 to accept members of Local 9639 and then impose successorship liability? Could Local 5741 lawfully insist, as a condition precedent to accepting the new members, that each member pay his or her *pro rata* share

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[25] *H.K. Porter Co. v. NLRB*, 397 U.S. at 108-09.

[26] *Howard Johnson v. Detroit Local Joint Board, Hotel & Restaurant Employees, supra*, 417 U.S. at 254-55; *Golden State Bottling Co. v. NLRB*, 414 U.S. at 191 n. S 6; *NLRB v. Burns Security Services*, 406 U.S. at 283-84, 287.

[27] 865 F.2d at 737.

of back pay liability?[28] If so, how would such a requirement square with the section 7 rights of members of Local 9639[29] or the settled rule that individual union members are not personally liable for unfair labor practices?

Finally, if, as here, imposition of successorship liability on an innocent local threatens to cause the financial distruction of the successor local, what calculus exists under the National Labor Relations Act to balance this cost and the impairment of the rights of innocent union members against the injury to the wrongfully discharged employee? Local 5741 submits that there is no such formula and that the only proper consideration is this:

> [The] public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is *always* the Board's principal concern in fashioning unfair labor practice remedies.[30]

In summary, it is apparent from the opinion of the Sixth Circuit that the majority was animated in large part by its concern that, absent a finding of successorship, a wrong would go unremedied. This concern is legitimate and understandable. However, it is not a concern that authorizes the Board to fashion remedies that themselves violate the Act or a concern that enables the courts, under the guise of limited judicial review, to blink Board action that undermines federal labor policy. In cases such as

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[28] 29 U.S.C. Section 411(a)(1) and (3) (equal rights of members and no special assignments).

[29] 29 U.S.C. Section 157.

[30] *Vaca v. Sipes*, 386 U.S. 171, 182 n. 8 (1967) (emphasis added).

this, in which the Board's remedial power is insufficient to resolve an important labor problem

> it is the job of Congress, not the Board or the courts [to remedy]. . . .[31]

CONCLUSION

For these reasons, Local 5741 urges that this petition for certiorari should be granted.

Respectfully submitted,

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[31] *H.K. Porter Co. v. NLRB*, 397 U.S. at 109.

APPENDIX

Nos. 87-5962/6167

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOCAL UNION NO. 5741, UNITED MINE WORKERS OF AMERICA, *Petitioner, Cross-Respondent,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent, Cross-Petitioner.*	ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed January 10, 1989

Before: KEITH and NELSON, Circuit Judges, and DUGGAN, District Judge.*

NELSON, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined, DUGGAN, District Judge, (pp. 11-13) delivered a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. The question for decision in this case is whether the National Labor Relations Board erred in holding that the petitioning United

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*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

Mine Workers local union is the "successor," for labor law purposes, of another UMW local, now defunct, that had an unsatisfied monetary obligation as a result of having committed an unfair labor practice. Petitioner seeks review of a Board order making it responsible for the other local's debt, and the Board cross-petitioners for enforcement. For the reasons stated below, we shall grant the Board's cross-petition for enforcement.

I

The defunct union, Local Union No. 9639 of the United Mine Workers of America, committed an unfair labor practice by causing the discharge of a non-union miner. The NLRB ordered the local to pay the miner his lost earnings. It was stipulated that the amount of Local 9639's liability came to $12,327.65, plus interest.

On August 19, 1982, this court granted enforcement of the NLRB order. About two weeks later Local 9639 filed a petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 *et seq.*, expecting to obtain a discharge of its debt to the miner. The Board filed a proof of claim on the miner's behalf, and he was awarded all of Local 9639's monetary assets, about $2100. Local 9639 asked the bankruptcy court for authority to continue to operate, but on September 27, 1982, after learning that the unpaid balance of its debt was not dischargeable, the local withdrew the motion and simply ceased to function. The local ultimately surrendered its charter to the UMW.

Between October 21 and November 9, 1982, every one of the approximately 55 working members of Local 9639 transferred his membership to Local 5741. The latter

local had theretofore had approximately 132 active and 356 inactive members. By November 23 approximately 190 of 243 idle or retired members of Local 9639 had also transferred to to Local 5741. These transfers resulted from "bathhouse talk" in which individual members of Local 9639 discussed the proximity of Local 5741 to themselvs and the mines in which they worked. Nineteen retired members of Local 9639 eventually transferred to other UMW locals.

At the time of the transfers into Local 5741, that local's president knew that the defunct local had been found guilty of an unfair labor practice and had been ordered to pay the discharged miner his lost wages. Local 5741 also knew, through its president, that Local 9639 had ceased to function as a result of the Board-imposed liability. No money or property of Local 9639 was transferred to Local 5741.

Under the constitution of the UMW, no transfer fees were payable by the members of Local 9639. Neither did the transferees have to execute new dues deduction authorization cards on behalf of Local 5741. The employer continued to remit dues to District 30 of the UMW for the Local 9639 members, just as it had done in the past. These remittances was designated for Local 9639 until at least Dember of 1982, when the secretary-treasurer of District 30 requested that the name of Local 5741 be used. Dues remitted for the defunct local were never returned by District 30. Instead, District 30 kept one-third for itself, remitted one-third to the UMW, and remitted the remainder to Local 5741.

Once the members of Local 9639 had transferred to Local 5741, that local began to act as their collective bargaining representative. Although no officers of Local 9639 became officers of Local 5741, the president of Local 5741 immediately reappointed eight transferees to their old positions on mine and safety committees. It is undisputed that Local 5741 took over representation of Local 9639's former members without any hiatus and that Local 5741 administered on their behalf the same collective bargaining agreement previously administered by Local 9639. Grievances of Local 9639 members arising prior to the transfer were processed by Local 5741.

On December 4, 1985, a regional director of the NLRB ordered that a supplemental hearing be held to determine whether Local 5741 was jointly and severally liable with Local 9639 for the balance of the back pay due the discharged non-union miner. The hearing resulted in a finding that Local 5741 was the successor to Local 9639 for purposes of Local 9639's unsatisfied backpay obligation, and the finding was ultimately adopted by the Board. The Board's findings of fact are conclusive if supported by substantial evidence, 29 U.S.C. § 160(e), and the foregoing facts, which we have adopted from the Board's decisions, are supported by substantial evidence.

II

Congress gave the NLRB authority to determine the remedies for labor organizations' unfair labor practices, to the end that a uniform national policy might be developed and enforced. *Garner v. Teamsters*, 373 Pa. 19, 94 A.2d 893, *aff'd*, 346 U.S. 485 (1953). It is the Board's task

to devise remedies that effectuate the policies of the Act, *Fibreboard Paper Prods. Corp. V. NLRB*, 379 U.S. 203, 215-16 (1964), and a reviewing court must give special respect to the remedies chosen by the Board, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). A remedial order will not be disturbed unless it represents a patent attempt to achieve ends contrary to the Act. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 327 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

Permitting a disappearing employer's unfair labor practices to go unremedied contributes to labor unrest, particularly where there is continuity in the employing industry; where there is substantial continuity between enterprises, a successor's failure to remedy its predecessor's unfair labor practices may appear to employees to be a continuation of the predecessor's labor policies. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). Similar considerations would seem to apply, *mutatis mutandis*, where a disappearing local union has committed an unfair labor practice, and there is substantial continuity between that local and one that continues to operate.

The Board's remedial powers under § 10(c) of the Act include the power to order a bona fide successor employer who has not committed an unfair labor practice to reinstate and provide back pay to an employee wrongfully discharged by the predecessor employer. *Golden State Bottling Co.*, 414 U.S. at 175-77. The decision whether to impose such liability involves striking a balance between the conflicting interests of the innocent successor, the public, and the victimized employee, *id.* at 181, and the Board is uniquely qualified to make that kind of

judgment. The Board is no less qualified to make the similar judgment called for by the facts of this case.

III

The test of successorship, in the employer situation, is whether there is "substantial continuity" between the enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, ___ U.S. ___, ___, 107 S.Ct. 2225, 2236 (1987). The successorship question is primarily factual in nature and involves consideration of a number of factors:

> "Whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisor; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers."

Id. Such indicia of continuity are all to be fed into the "substantial continuity" calculus, and the presence of absence of a single factor is not determinative. All the circumstances must be evaluated, with particular attention being paid to whether employees who have been retained will view their job situations as substantially unaltered. *Id.* at 2236-37. The labor law doctrine of successorship is a broad one, and as long as there is continuity in the "employing industry," the public policies of the doctrine will be served by its broad application. *Golden State Bottling Co.*, 414 U.S. at 182 n. 5.

The NLRB first applied its successor liability doctrine to labor organizations, as opposed to employers, in *Local Union No. 46, Metallic Lathers (Cement League)*, 259 N.L.R.B. 70 (1981), *enforcement denied in pertinent part*, 727

F.2d 234, 237-38 (2d Cir. 1984). In *Cement League* the NLRB concluded that the United Brotherhood of Carpenters, as the successor to the International Lathers, should be responsible for remedying unfair labor practices of the Lathers, 259 N.L.R.B. at 70. The Board noted that the victims of unfair labor practices in a union affiliation context are just as needful of a meaningful remedy as are unfair labor practice victims caught by the transfer of an employing business.

The Court of Appeals for the Second Circuit refused to enforce the imposition of liability upon the Carpenters Union in *Cement League*. It did so not because it disagreed with the Board's conclusion that the latter union was the Lathers' successor, or because it considered the successor doctrine inapplicable to unions, but because it found that the Carpenters had no knowledge of the unfair labor practices at the time of the succession. See *Local Union No. 46*, 727 F.2d at 237-38. In the case at bar, by contrast, it is undisputed that Local 5741 knew of the unfair labor practice when the members of Local 9639 transferred into Local 5741.

A special master of the United District Court for the Southern District of New York recently offered the following list of factors relevant to a finding of union successorship:

"1) whether the successor union had notice of the liability;

2) the ability of the predecessor union to provide relief;

3) whether there has been a substantial continuinty of the union's operations;

4) whether the successor union uses the same offices or encompasses the same jurisdiction;

5) whether the successor union has absorbed the predecessor's membership;

6) whether the officers of the predecessor union continued in some official capacity in the successor union;

7) whether the wages, terms and conditions of employment administered by the predecessor, as set forth in the collective bargaining agreement, are the same or substantially equivalent to those administered by the successor;

8) whether the members continue to pay dues and enjoy the same membership rights; and

9) whether the members continue to work at the same trade for the same or similar employers."

EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n., 46 Emp. Prac. Dec. (CCH) ¶ 37,846 at 51,322 (S.D.N.Y. 1988); see also *EEOC V. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

Reviewing the foregoing list in light of the situation presented in the case at bar, we cannot say that the NLRB erred in holding Local 5741 liable as a successor. The indicia of continuity between Local 9639 and Local 5741 are more numerous and more substantial than the indicia of discontinuity.

The 55 active employees who transferred to Local 5741 continued to work in the same mines without interruption or dislocation. The mine and safety committees remained in place with the same members. Dues continued to be checked off and remitted to District 30 of the UMWA without interruption. Grievances filed before the

dissolution of Local 9639 were processed by Local 5741, and District 30 continued to be substantially involved in the grievance process, just as it had been before. Local 5741 took over representation of Local 9639's former members without any hiatus and administered the same contract previously administered by Local 9639. From the perspective of the employee who had been victimized by Local 5741, nothing in the employing industry had changed – and the need for remedying the unfair labor practice had not dissipated.

We think it is probably true, as Local 5741 contends, that it did not become Local 9639's successor voluntarily. The Landrum-Griffin Act guarantees equal rights to all persons who have fulfilled union membership requirements, 29 U.S.C. §§ 402(o), 411(a)(1); see also *Alvey v. General Elec. Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980) (as modified on denial of rehearing and rehearing en banc September 16, 1980) and *Parish v. Legion*, 450 F.2d 821, 824-26 (9th Cir. 1971). The Landrum-Griffin Act does not prevent unions from reserving discretionary power to refuse membership, *Gavin v. Structural Iron Workers Local No. 1*, 553 F.2d 28, 30-31 (7th Cir. 1977), but where no such power has been reserved, applicants who meet the requirements cannot lawfully be denied membership. *Woods v. Local Union No. 613, Int'l Bhd. of Elec. Workers*, 404 F.Supp. 110, 116-18 (N.D. Ga. 1975). Because the former members of Local 9639 had fulfilled all of the requirements for membership in Local 5741, it is doubtful that Local 5741 could have excluded the transferees from membership or could have refused to represent them. See *NLRB v. Retail Clerks Union Local 1179*, 526 F.2d 142,

145-47 (9th Cir. 1975) (attempt to discipline union members by refusing to transfer their membership to another local union is contrary to national labor policy and therefore violative of NLRA); *NLRB v. Plumbers & Steam Fitters Local Union No. 100*, 491 F.2d 1104 (5th Cir. 1974) (refusing to accept members of sister locals in contravention of international's constitution was violation of NLRA); *NLRB v. Katz*, 622 F.2d 242 (6th Cir. 1980) (change of local affiliation by employees does not affect employer's obligation to recognize and bargain with union); *NLRB v. Coca-Cola Bottling Co.*, 616 F.2d 949 (6th Cir.) (employer commits unfair labor practice by withdrawing recognition after union local switches affiliation from one international to another), *cert. denied*, 449 U.S. 998 (1980).

If Local 5741 became a successor involuntarily, its knowledge of the unremedied unfair labor practice of its predecessor may be less significant than it would be otherwise. This does not mean, however, that the Board could not properly find that an imposition of liability would be equitable on the facts of this case – and it is the balancing of the equities that legitimates the Board's decision to impose liability on a successor. *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 969 (1967), *enforced in part sub nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). As the Supreme Court has said, "the *Perma Vinyl* line of cases has involved striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." *Gold State Bottling Co.*, 414 U.S. at 181.

In the case at hand, to repeat, there has been no real change in the employing industry insofar as the victim of

the unfair labor practice is concerned. The need for remedying the unfair labor practice remains undiminished. The predecessor union no longer exists, and it is Local 5741 that is in the best position to provide a remedy. Requiring it to do so serves the public's interest in seeing that the policies of the Act are carried out.

Although Local 5741 may not have chosen to become the defunct local's successor, Local 5741 did succeed to the dues obligations of the former members of Local 9639. As the administrative law judge correctly noted, dues payments of union members are the "economic lifeblood of a labor organization and normally its primary source of income." If these dues were not assets of Local 9639, strictly speaking, the transfer of this source of revenue is at least analogous to a transfer of income-producing assets from a predecessor employer to a successor employer.

The judgment call that the NLRB had to make in this case was not an easy one, but that should make us all the more reluctant to overturn it. Here, as in similar cases, the courts "cannot say that the Board has erred in thus 'striking [the] balance to effectuate national labor policy . . . .' " *Golden State Bottling Co.*, 414 U.S. at 187 (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957)).

The petition for review is DENIED, and the cross-petition for enforcement is GRANTED.

DUGGAN, District Judge, dissenting.

I respectfully dissent.

The majority opinion discusses many of the factors to be considered in determining whether successor liability should be imposed. It does not, however, place appropriate significance on the fact that Local 5741 did not *voluntarily* choose to become the successor to Local 9639. The majority opinion acknowledges that it is "probably true" that Local 5741 did not become the successor voluntarily. In fact, the NLRB admitted that Local 5741 " . . . was obligated to accept valid transferees as members." (NLRB brief, p.4.) This factor, in my opinion, distinguishes this case from those relied upon by the majority and by the NLRB.

Implicit in the Supreme Court's decision in *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 38 L.Ed.2d 388, 94 S.Ct. 414 (1973) is the fact that the successor chose to become the successor. The same is true in the *Perma Vinyl* decision (*Perma Vinyl Corp.*, 164 N.L.R.B., 968 (1967)), which the Supreme Court cited with approval in *Golden State*. The Supreme Court, quoting *Perma Vinyl Corp.*, stated:

> The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship on him. *When he submitted himself* in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practice.

Golden State at 419, n.2 (emphasis added). The courts' tacit assumption, in the *Golden State* and *Perma Vinyl*

opinions, is that the application of successor liability is inequitable unless the successor voluntarily agreed to assume the position of its predecessor, including the predecessor's liabilities.

The majority states that the NLRB first applied its successor liability doctrine to labor organizations in *Local Union No. 46, Metallic Lathers (Cement League)* 259, NLRB 70, (1981). Yet on appeal, the Second Circuit, while specifically declining to reach the "troublesome question whether there was a 'substantial continuity of identity' " between the predecessor and successor, refused to impose successor liability on the Carpenter's Union because it found that the Carpenter's Union had no knowledge of the unfair labor practices charges pending against its predecessor at the time the two unions affiliated. *NLRB v. Local Union No. 46, Metallic Lathers*, 727 F.2d 234, 237-38 (2nd Cir. 1984). The same principle on which the *Golden State* and *Perma Vinyl* courts relied is evident (although unexpressed) in *Local Union No. 46, Metallic Lathers*, that is, in the absence of a knowing, voluntary assumption of a predecessor's debt, a successor cannot equitably be held liable.

In sum, when a successor has no knowledge of the predecessor's liability, or when the successor has no choice but to substitute for the predecessor, as in the present case, I believe that is is unjust to burden the successor with the financial obligations of the predecessor.

Although it is undisputed in the instant case that after the transfer of members, Local 5741 began receiving a portion of each active member's dues, ranging from

$11.00 per year to $14.00 per year,[1] these *future* dues presumably were to cover the cost of *future* services to be rendered to these members. Even assuming that there were no increased administrative cost in absorbing these 55 members, the annual income received from the new members would total less than $800.00. At the same time, however, Local 5741 was required to absorb a debt of the predecessor local in excess of $10,000. Because the membership of Local 5741 could not refuse to accept Local 9639's former members, the financial burden of the defunct local should not be imposed upon Local 5741. The Board's decision to impose successor liability on an entity that did not choose to become a successor is not supported by substantial evidence on the record as a whole and I believe such decision to be clearly erroneous. The Board's petition for enforcement should be denied.

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[1] The record also reflects that a number of idle or retired members of Local 9639 also transferred to Local 5741, but the record is silent as to what amount of dues, if any, Local 5741 collects from these members.